VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

THE AMERICAN TRADITION INSTITUTE, and THE HONORABLE DELEGATE ROBERT MARSHALL Petitioners, v. **RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA,** Respondent.	Civil Docket No. CL 11-3236 Petitioners' Opposition to Motion To Revise the Protective Order

PETITIONERS' OPPOSITION TO THE MOTION TO REVISE THE PROTECTIVE ORDER

Attorneys for the Respondent University of Virginia (UVA) have applied an ancient legal aphorism in their motion to revise the protective order, "When the law is against you, argue the facts. When the facts are against you, argue the law. When both are against you, attack the plaintiff." Petitioners refuse to rise to this bait. We instead professionally and courteously oppose the motion to revise the agreed and approved Protective Order, and continuation of the stay, for the simple reason that there is no compelling reason or good cause to do so.

Before articulating this position, however, Petitioners' counsel believe it appropriate to make a statement on the tenor and nature of UVA's unfounded collateral attack. Briefly, we believe opposing counsel would benefit from a public reminder of the Principles of Professionalism for Virginia Lawyers, unanimously endorsed by Virginia's statewide bar organizations and the Chief Justice of the Commonwealth of Virginia, to wit: "In their very first

professional act, all Virginia lawyers pledge to demean themselves 'professionally and courteously.'" The Principles continue: "In my conduct toward opposing counsel, I should treat opposing counsel with respect and courtesy and avoid ad hominem attacks."

I. POSTURE OF THE CASE

On November 1, 2011, the parties will assemble before the Court to argue Michael Mann's request to intervene in the above titled matter. Respondent UVA now wishes to add to that hearing consideration of a motion to revise the Protective Order previously agreed to by the parties and issued by the Court on May 24, 2011, and to continue the stay until the parties can negotiate a new protective order, or until the Court otherwise disposes of their motion.

On October 7, 2011, Petitioners sent an informational letter to the Court explaining how they intend to carry out the Protective Order and seeking any further direction the Court wished to give. The letter (Exhibit 1) explains that Petitioners would examine no less than 100 and no more than about 200 emails of the 40,000 pages (approximately 12,000 emails) emails UVA has claimed as exempt. From these emails, Petitioners would supply the Court with 25 to 50 exemplar documents for use in the merits arguments of the case. In addition, Petitioners would supply UVA with a log as to exactly which emails it accessed from the full collection while identifying the exemplars. Under its plan, Petitioners would not troll through the full collection, but would only seek emails through the means described in Exhibit 1.

Notably, UVA has stated that under any protective order they might draft, Petitioners would be provided the unexpurgated and unredacted complete content of any exemplar emails needed under the requirements of *Bland*, as discussed below. The sole, substantive result of UVA's motion would be to reduce Petitioners' anticipated review of about 100 to 200 emails to a review of from 25 to 50, out of a collection of what has recently grown to 12,000 records. The

other result is process-related, which would be to ensure that Petitioners do not select exemplars. This does appear to be the principal objective of seeking to reopen the Order.

Finally, with regard to the posture of this case, Petitioners call the Court's attention to the exact nature of the emails in question. UVA counsel has advised us that to the best of their knowledge, having taken time to examine the collection, the email collection does not contain any of the attachments to the emails and appears not to contain any draft or final papers or reports, computer code, scientific models, or scientific data. The collection appears to consist of nothing other than emails from over five years ago and which the Commonwealth of Virginia and UVA policies unambiguously state are subject to the Virginia FOIA and for which no employee should have any expectation of privacy. That is, the large volume of records claimed as exempt are of like kind, quality and character as those released to date by the University before declaring all other records, and all records recently discovered, as exempt under VFOIA.

II. STANDARD FOR MODIFICATION OF PROTECTIVE ORDERS

Under the rule established in *Bland*, UVA has informed the Petitioners that they will place the entirety of 12,000 emails claimed as exempt into the record of this case, under seal. *See, Paul C. Bland vs. Virginia State University,* 272 Va. 198, 630 S.E.2d 525 (2006), ("This appeal illustrates a problem seemingly endemic to FOIA cases. * * * [W]e cannot 'decide the issue in a vacuum;' we encouraged the filing of allegedly confidential records for in camera inspection by the trial court and, if necessary, by an appellate court.)

Bland is also instructive in that plaintiff Bland, appearing *pro se*, was given an opportunity to examine the unredacted documents. If, as the AAUP suggests[1], there is an

[1] The American Association of University Professors, without leave of court, submitted a so-called "amicus letter" that misstates both the facts of this case and the law under *Bland*. We address their letter in the final section of this memorandum.

"accepted practice" in Virginia under *Bland*, it is to allow the counsel for the FOIA plaintiffs to examine the documents in an unredacted form.

Mr. Bland, acting as his own counsel, was restricted in his use of the records he sought under FOIA, but had access to them for a good cause. He needed them to make his legal argument, and the Court gave them to him for that purpose. Petitioners are in the same position as Bland and under the rule of *Bland*, negotiated a protective order that allowed the Petitioners access to the records requested under FOIA.

UVA cites to Supreme Court Rule 4:1(c) to argue that a protective order is appropriate for a good cause and that good cause is the standard for revising a protective order. That rule applies to pre-trial discovery, not to judicial records and does not establish the standard for revising a protective order over judicial records.[2]

The standard for protection of judicial records is established in *Shenandoah Pub. House, Inc. v. Fanning*, 368 S.E.2d 253, 257 (Va. 1988).

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.

Id. at 258-59 (citing to *Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 510 (1984)*). The *Shenandoah* court further expanded on this rule:

- We further believe that, to overcome that presumption, the moving party must bear the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order.

Shenandoah, op. cite (emphasis added). Because this Court has already issued a carefully constructed and negotiated protective order, the question becomes, what interest is so compelling

[2] Rule 4:1(c)(7) does, however, specifically provide that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way". The existing protective order successfully implements this authority under the rule.

that the negotiated protective order is insufficient to overcome the need for plaintiffs' counsel to examine 100 to 200 of the 12,000 emails?

UVA cites to a federal pre-trial discovery case, *Parkway Gallery*, suggesting that a court can consider granting relief from an "improvident agreement". *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 267 (M.D.N.C. 1988). The *Parkway Gallery* court did not, however, accede to granting the requested relief, stating "When a party willingly accedes to the entry of a stipulated protective order, the Court will be hesitant to relieve that party of its obligations." *Id.*[3] Petitioners also point to *Factory Mutual Insurance* whose court also denied a motion to modify a protective order.

> "when the party seeking modification stipulated to the terms of the order, courts have treated the issue of showing good cause differently. *Bayer AG and Miles, Inc. v. Barr Labs., Inc.*, 162 F.R.D. 456, 465 (S.D.N.Y. 1995) ("Where, however, the modification motion is brought by the party who stipulated to a blanket protective order, the party should be held to its agreement. . . ."

Factory Mut. Ins. Co.v. Insteel Indus., 212 F.R.D. 301, 304 (M.D.N.C. 2002).

III. UVA LACKS A COMPELLING INTEREST TO MODIFY THE ORDER

UVA offers two reasons to upset the existing protective order, that the counsel allowed to examine the exempt documents under the order are effectively in-house counsel and should not be given the same access as outside counsel; and, that counselors Schnare and Horner "will act inconsistently with the spirit and letter of their commitments expressed in the protective order." Neither the facts nor the law support UVA's contentions.

[3] The *Parkway* court also offers this rationale for its refusal to grant relief from the protective order, "The sharing of information between the parties usually promotes efficient and inexpensive litigation, conserves judicial resources, and serves to counterbalance uneven financial resources which may otherwise deny access to justice to the more financially modest party." (citing *Burlington Bd. of Ed. v. U.S. Mineral Prod. Co.*, 115 F.R.D. 188, 190 (M.D.N.C. 1987). Petitioners assert these considerations are also highly relevant to the instant matter.

A. **The In-house Counsel Rule**

UVA argues that the Court should deny Dr. Schnare and Mr. Horner access to the emails because they are in-house counsel to ATI, claiming this is necessary in order "to prohibit such access when the corporate role served by in-house counsel renders their access to confidential materials inappropriate."

Dr. Schnare, Mr. Horner and the Honorable Robert Marshall sought the documents at issue, in a January 6, 2011 Request under VFOIA, quite plainly stating, "We the undersigned citizens and residents of the Commonwealth of Virginia, in coordination with the Environmental Law Center of the American Tradition Institute," seek the described records, and concluding with our individual towns of residence making plain our standing as individual citizens of the Commonwealth of Virginia. In this matter, Dr. Schnare essentially represents himself. Because his interests are identical to those of Mr. Horner and Mr. Marshall, he represents their interests as well. Although initiated as a *pro se/pro bono* representation, the matter was titled to reflect the representation through the American Tradition Institute (ATI) Environmental Law Center where Dr. Schnare serves as Director (Schnare Aff. at ¶2) and Mr. Horner serves as a Senior Fellow and Director of Litigation (Horner Aff. at ¶2). Neither serves as in-house counsel to ATI and ATI has no "in-house" counsel. (Schnare Aff. at ¶3.) Both Horner and Schnare pursue this action for records sought in their capacity as Virginia residents and taxpayers, in coordination with ATI's Environmental Law Center, as made plain in their Request. They maintain all rights of citizens of the Commonwealth of Virginia in this matter. Regardless, Schnare and Horner also remain officers of the court, including Schnare's admission to the Virginia Bar.

The rule allowing in-house counsel access to documents under a protective order rises from *US. Steel Cmp. v. United States,* 730 F.2d 1465 (Fed. Cir. 1984) and is generally stated as:

in-house counsel is entitled to the same access to plaintiff's confidential information as outside counsel where in-house counsel has no involvement with defendant's competitive decision-making or management regarding sales, marketing, pricing, product, design, development, or research. *See, e.g., Volvo Penta of the Ams., Inc. v. Brunswick Corp.*, 187 F.R.D. 240, 242 (E.D. Va. 1999). As the *Volvo* court explained,

> the lower court erred when it denied in-house counsel access to confidential information based solely on that attorney's "general position" within his employer-client's corporation. The court indicated that because in-house attorneys, like any other retained attorney, must serve as "officers of the court" and must abide by the "same Code of Professional Responsibility" and ethics, a court could not merely assume that in-house attorneys would allow confidential information to fall into the hands of their employer.

Volvo Penta 187 F.R.D. at 243. *And see,*

> Denial or grant of access [to confidential information], however, cannot rest on a general assumption that one group of lawyers are more likely or less likely inadvertently to breach their duty under a protective order. . . . Like retained counsel, . . . in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsel provide the same services and are subject to the same types of pressures as retained counsel. The problem and importance of avoiding inadvertent disclosure is the same for both. U.S. Steel, 730 F.2d at 1468.

ActiveVideo Networks, Inc. v. Verizon Communs., Inc., 274 F.R.D. 576, 579 (E.D. Va. 2010).

The in-house counsel rule would prohibit access to documents when the in-house counsel participates in "competitive decision-making."[4] But, UVA and ATI are not in competition. ATI does not offer products or services in competition with UVA or PSU. ATI is not a competitor for research grants, professional publications, scientific research or any other normal element of a UVA or PSU faculty member or the universities at large. ATI does not make company decisions that affect contracts, marketing, employment, pricing, product design, or any decisions

[4] *And see,* " n4 See also Volvo Penta, 187 F.R.D. at 242 ("'Competitive decisionmaking' refers to the in-house counsel's role, if any, in making company decisions that affect contracts, marketing, employment, pricing, product design, or 'any or all of the client's decisions . . . made in light of similar or corresponding information about a competitor.'") (quoting U.S. Steel, 730 F.2d at 1468 n.3) (omission in original)." *ActiveVideo Networks, Inc. v. Verizon Communs., Inc.*, 274 F.R.D. 576, 579 (E.D. Va. 2010).

that reflect similar or corresponding activities by UVA or PSU. (Schnare Aff. at ¶ 24, Horner Aff. at ¶ 3.) Further, Messrs. Schnare and Horner are licensed attorneys bound by codes of professional responsibility and as officers of the court bound by the protective order. (Schnare Aff. at ¶ 1, Horner Aff. at ¶ 1.)

Because Messrs.' Schnare and Horner are citizens of Virginia seeking access to records under VFOIA, are not "in-house counsel" for ATI, are attorneys bound by codes of professional responsibility and as officers of the court bound by the Protective Order, and because ATI is not in competition with UVA, there is no compelling reason, much less good cause, to limit their access to the emails under the strict conditions of the Protective Order.

B. Concerns about Confidentiality of UVA emails are unwarranted.

UVA makes two arguments they claim warrant modification of the Protective Order, (1) that Messrs. Schnare and Horner will violate their codes of professional responsibility and duties to the Court; and, (2) an error-filled ad hominem attack on Dr. Schnare.

1. UVA has no basis to question opposing counsel's professional integrity.

Litigation throughout time has consisted of two elements, the public debate about the case and the legal proceedings. The former is often loud, noisy, combative and antithetical to the latter which is supposed to be professional and courteous. UVA's conflation of these two elements is simply self-serving hyperbole without merit and also misrepresents the content of the exhibits to which it refers.

Referring to Respondents' Exhibit 1, UVA implies that ATI intends to disclose emails the Court finds are exempt "so that ATI can make them available to all who wish to review them." UVA's citation is a bald misrepresentation of the ATI press release, which refers not to the emails claimed as exempt, but to the non-exempt documents. The actual ATI statement is:

> It took a petition to force UVA to agree to produce the documents that by statute they should already have produced. The day before the court hearing, UVA finally agreed to a date when they must produce all the documents they believe are not protected from disclosure. The court entered an order that forces UVA to honor that agreement and to produce the documents in easy-to-read electronic form so that ATI can make them available to all who wish to review the work of this highly controversial former Virginia employee.

Kast Ex. 1 (emphasis added). Having misrepresented to the Court ATI's press release regarding the non-exempt documents, they next misrepresent the press release's careful statement that only ATI attorneys will be permitted to review the exempt documents, and then only under the constraints of the Protective Order. (*See*, Kast Ex. 1.)

Having misled the Court on the ATI press release, UVA then misdirects the Court by referring to a statement by the Honorable Robert Marshall that he would like to see what the University has withheld. Delegate Marshall's statement and wishes have no bearing on this matter. He, like many others, would like to see the emails UVA is hiding, but he and the rest of the public will not get that opportunity until such time this Court decides UVA must release the emails. UVA's attempt to link Delegate Marshall's wishes to the duty on Messrs. Schnare and Horner is no more than a dilatory misdirection without merit.

UVA next takes issue with ATI's use of the term "breakthrough" when describing the Protective Order. In light of the fact that UVA has spent in excess of half a million dollars keeping these emails from the Virginia Attorney General and has repeatedly failed to meet its time deadlines under the Virginia FOIA, it is difficult to not view the Protective Order as a breakthrough because it established hard deadlines to which UVA must adhere and that will result in a definitive judicial finding regarding the emails.

Moreover, and more importantly, whether or not this constitutes a breakthrough is irrelevant to the question as to whether UVA has a compelling reason to ask the Court to modify

the Protective Order. The use of the word breakthrough in an ATI press release does nothing to inform the Court on Schnare's and Horner's attested and oft-repeated statements that they understand their professional duty and duty to the Court and will fully comply with the Protective Order.

UVA then suggests that an accurate press report on the Protective Order is further evidence that Schnare and Horner will abandon their duty to the profession and this Court, suggesting that a third party's reporting on this matter is evidence of a "pervasive pattern" nefarious intent by Schnare and Horner. Obviously UVA's misleading and irrelevant complaints offer neither well-founded nor reasonable examples of compelling evidence to modify the protective order, especially in light of the fact that, in UVA's words, the University has "sought and received repeated assurances from Messieurs Horner and Schnare that they understood and intended to comply with their responsibilities pursuant to the Order." They have, and counsel do. (Schnare Aff. at ¶ 26 and Horner Aff. at ¶ 5.)

2. UVA's ad hominem attack on Dr. Schnare is without foundation.

UVA also mounts an error-filled personal attack on Dr. Schnare in a failed attempt to impeach his honesty and integrity. They begin with making a claim that in a casual hallway conversation between Schnare and UVA attorney Richard Kast, Dr. Schnare misrepresented his employment standing. In fact, Dr. Schnare merely followed federal ethics rules by downplaying -- not misstating -- his employment status as an attorney with the U.S. Environmental Protection while acting *pro bono* and *pro se* before this Court. (Schnare Aff. at ¶ 8-9.) The federal ethics laws specifically prohibit Dr. Schnare from using or permitting the use of his position to identify him in connection with outside activity. *See*, 5 C.F.R. 2635.807(b). Had DR. Schnare done what Mr. Kast now implies he believes Schnare should have done, we now have little doubt that Kast

would invoke a charge against Schnare for failing to follow federal rules, and then claim a lack of integrity compelling reopening of the agreed and approved Protective Order. Further, Dr. Schnare's curriculum vita and professional affiliations are public knowledge and have been available on the internet for many years. (Schnare Aff. at ¶ 6.)

UVA also complains that Dr. Schnare misrepresented the period of time he has been authorized to perform *pro bono* outside employment, to wit "over 5 years". Like other EPA and federal attorneys, Dr. Schnare has volunteered his time to non-EPA public interests throughout his career and has routinely sought and received approval for those activities, filing appropriate ethics forms each year. (Schnare Aff. at ¶ 11, citing as examples Exhibits 9 and 10.) He first offered *pro bono* litigation services in 2000, arguing on behalf of a class of plaintiffs before the U.S. Court of Appeals for the Second Circuit. (Schnare Aff. at ¶ 10.) UVA's complaint is simply without foundation.

The University's counsel also makes a fuss over an EPA FOIA response regarding Dr. Schnare's application for outside employment with ATI. Again, Mr. Kast's filing indicates that he is ill-informed, but the fault is not merely with his ignorance of federal ethics rules but with an error in the EPA letter. Justinia Fugh, EPA's Senior Counsel for Ethics, failed to obtain information about Dr. Schnare's application for outside employment with EPA when she stated, in lieu of obtaining the readily available information, that it was "purportedly prepared" on the date on the face of the memorandum. Kast jseizes this substitute for diligence, "purportedly", to impugn Dr. Schnare by implying this word allows him to believe the letter was fabricated. The metadata associated with the letter clears the air on this. The memorandum was created and submitted on November 16th, 2010, the day he forwarded the memorandum and within a week

after the ATI principals had requested Dr. Schnare to serve as the Director of their Law Center. (Schnare Aff. at ¶ 12-13 and Exhibit 5.)

Mr. Kast also misrepresents the Fugh letter by misstating Dr. Schnare's ethics duties. The Fugh letter simply states that Dr. Schnare's duty is to seek prior approval for his outside activities. That he did. (Schnare Aff. at ¶ 15.) As demonstrated in Exhibit 10, Schnare did in fact timely seek prior approval for his outside activities, which the factual record makes plain is indisputable. (Schnare Aff. at ¶ 11.) The Fugh letter goes on to erroneously state that Adam Kushner, Schnare's Deputy Ethics Official, had no record of receiving or approving the request. That Mr. Kast was unaware of the Fugh error does nothing to remedy his recitation of it also being in error.

Although Dr. Schnare properly forwarded his memorandum into his management chain, *an intervening supervisor* failed in his obligation to send it to Mr. Kushner, a fact Dr. Schnare did not learn until late September, 2011, nearly a year after he had submitted the memorandum. (Schnare Aff. at ¶ 13.) While Mr. Kushner, the Deputy Ethics Officer, may not have received a copy of the memorandum, he had constructive knowledge of its existence and clear knowledge of the outside activity as it was listed on Dr. Schnare's 2011 ethics filing, submitted in February, 2011, three months after the memorandum was sent. (Schnare Aff. at ¶ 14 and Exhibit 4.)

Further, concern about this memorandum is mooted by its insignificance. Mr. Kushner's ethics subordinate, Ms. Jeanne Duross, informed Dr. Schnare that any activities he took with regard to ATI were covered under prior outside employment approvals for such *pro bono* work. (Schnare Aff. at ¶ 17.) Further still, Dr. Schnare had a reasonable expectation that his *pro se*

representation in the instant matter was approved as he has an absolute right under federal law to represent himself. *See*, 5 C.F.R. § 3801.106(b)(i) and Schnare Aff. at ¶ 18.[5]

Dr. Schnare is a highly decorated retiree of the U.S. Navy and the U.S. Environmental Protection Agency. (Schnare Aff. at ¶ 15, n2.) He has followed the ethics procedures carefully throughout his federal career and the misrepresentations, errors and unsupportable ad hominem attack on him are utterly without foundation. Because we refuse to abandon our commitment to professionalism and courtesy, we make no statement as to UVA's intentions, motivations or the appropriateness of these unworthy accusations.

IV. PETITIONERS' PROPOSED ACTIONS UNDER THE PROTECTIVE ORDER

The Petitioners have explained to the Court how they would identify exemplar emails for further use in this litigation, a discussion we include in this memorandum by reference. (Exhibit 1.) As made clear in that letter, and above, the parties entered into this agreement freely and to address two problems. First, both parties recognized the problem the court identified in *Bland* and the need for Petitioners' counsel to have honestly representative documents to use in its future arguments before this Court. Second, over the course of months Petitioners had lost faith in the University's willingness or ability to properly execute its obligations under VFOIA in this particular matter. UVA first claimed they did not have the emails. Then they admitted they had them, but refused to honor a civil investigation demand of the Attorney General. They then admitted in another court that the emails were subject to FOIA, but repeatedly failed to produce

[5] Kast also suggests that Schnare violated his outside employment agreement by representing himself in the instant matter because of his self-imposed restriction to have other attorneys prosecute cases for ATI. In fact, Dr. Schnare was not ATI counsel on any other case ATI has prosecuted, thus following his self-imposed restrictions. (Schnare Aff. at ¶ 20.) As well, Kast claimed that Dr. Schnare violated his outside employment agreement by conducting telephone calls and other work associated with this case during "normal business hours." Dr. Schnare took particular care to conduct business in this case outside his actual work hours, during lunch or other allowed breaks and while on official leave days. (Schnare Aff. at ¶ 22.)

non-exempt emails in a timely fashion.[6] It appeared to the Petitioners that the University would take any step it could to keep these emails from seeing the light of day, some of which have made their way to the public domain already to the University's great embarrassment, up to and including failing to provide representative exemplars for use in the litigation. To address these two problems, the parties negotiated and agreed to the Protective Order this Court entered.

We ask the Court to keep in mind that the only means the Petitioners have to ensure the Court receives a fair representation of the emails is for the Petitioners to select the exemplars themselves. Having done that, the University will have every opportunity to salt the record with any others it might choose to place before the court. In the alternative, to ensure representative exemplars, UVA has proposed to force the Court to review the entire collection or otherwise force the Court to select exemplars. Petitioners believe that UVA does nothing to reduce the burden on the Court by imposing on the Court what the parties have already agreed to do.

Because the Respondents have failed to satisfy their legal burden to offer a compelling reason to modify the Protective Order, or even a good cause to do so, we ask the Court to deny the motion to modify and the companion motion to continue the stay, and allow the case to proceed in an orderly and timely fashion as required by the Virginia Freedom of Information Act.

V. THE AAUP LETTER

Without leave of court, the American Association of University Professors (AAUP) has submitted a letter to the court, ostensibly supporting Mr. Mann's intervention, but more specifically objecting now to the May 24, 2011 Protective Order from which the Respondent also

[6] We also note that subsequently, as the hour approached for complying with the Protective Order, the number of responsive records skyrocketed, after the University had twice claimed supposedly exhaustive searches; in defiance of all laws of probability, each of the thousands of additional records was then declared by the University as exempt under VFOIA.

This lack of faith in the University is now exacerbated by the collateral and ad hominem attacks on Petitioners' counsel.

now wishes to walk away. Because the AAUP admits they are ignorant with regard to Virginia law, because they misrepresent the holdings in *Bland* and because they misrepresent the facts in this case, Petitioners ask the Court to disregard the letter and not accept it into the record of the case.

The AAUP misstates the outcome of *Bland*. They claim that *Bland* requires UVA to prepare an index of potentially exempt documents and the basis for the claimed exemptions. They further suggest this is the "accepted practice" in Virginia. *Bland* does no such thing, a point on which both Petitioners and Respondents agree. Indeed, it is the absence of such a requirement that resulted in the parties agreeing to a protective order so as to provide the Court exemplars of the emails sought.[7] If there is any "accepted practice" rising from *Bland*, it is that the courts expect Virginia governmental organizations to supply the courts with copies of all contested records and show to petitioners' counsel unredacted copies of those documents. This is what the parties in this case have agreed to and incorporated into the Protective Order.

The AAUP also claims that the emails are "foundational materials necessary to scholarly research that may someday be published." As previously discussed, the emails are nothing more than emails. According to UVA the electronic collection at issue in this case contains no data, no computer code, no models, no draft papers or reports and none of the attachments to the emails. The relationship of the emails to scholarly research we leave to a later stage in this proceeding, but without question, the emails are not "foundation materials" to climate scientists.

As a precursor to the later stage in this case, however, and to reinforce the apparent fact that the AAUP is doing no more than attempting to help UVA hide improper behavior of faculty at UVA and elsewhere, we supply one email we believe is in the collection but which UVA has

[7] In contrast, *Vaughn*, a federal case referred to by both parties to this dispute, established a requirement for federal agencies to create such an index. These "Vaughn logs" are now commonly used by the federal judiciary as the means through which to evaluate agencies' claims of FOIA exemption under the federal law.

refused to release as exempt, and is one of several examples we can provide of why the public deserves to look behind the veil. In this email we find the following: "I will be emailing the journal to tell them I'm having nothing more to do with it until they rid themselves of this troublesome editor." See Exhibit 7. Notably, in a different email also believed to be in the collection, the editor in chief describes their editorial process and makes clear the editor in question followed normal and proper procedures. See Exhibit 8. That editor was eventually forced out of his position, in part by the actions of Mr. Mann and his correspondents. That behavior by Mann and his colleagues is in direct conflict with the AAUP code of ethics. Other emails reflecting similar actions of questionable ethical or professional standards also exist among those already in the public domain, sent to or from Mann accounts at UVA and responsive to Petitioners' Request but which UVA apparently declares exempt under VFOIA as "proprietary". Petitioners simply don't believe this kind of email is foundational to anything other than the need for a careful review of how faculty behave at UVA.

Finally, the AAUP offers no basis for amicus standing or intervention that UVA does not already offer. For these reasons, Petitioners ask the Court to disregard the AAUP letter and not enter it into the record of this matter.

THE AMERICAN TRADITION INSTITUTE
and THE HONORABLE ROBERT MARSHALL

by: _____
Counsel

David W. Schnare (VSB 44522)
schnareati@gmail.com
9033 Brook Ford Road
Burke, VA 22015

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2011, I served by electronic mail a true and correct copy of Petitioners' Memorandum in Opposition to Respondent's Motion to Modify the Protective Order on:

Richard C. Kast, Esq.,
Office of General Counsel,
University of Virginia,
Charlottesville, Virginia 22904,
Attorney for Respondent

Scott Newton, Esq.,
Stephens, Boatwright, Cooper, Coleman & Newton,
9255 Lee Avenue,
Manassas, Virginia 20110,
Local Counsel for the Potential Intervenor

By: _____
David W. Schnare

Dated: October 24, 2011.